INDEX

	Page
I. New River at the site of respondent's project is navigable water of the United States	2
A. The controversy is one of law	2
B. Comparison with other rivers held navigable	5
1. The DesPlaines River	6
2. The Fox River	7
3. The Colorado River	8
C. The facts of navigability	9
1. The Allisonia-Radford and Wiley's Shoals-Hinton stretches	9
2. The Radford-Wiley's Shoals stretch	11
3. Physical characteristics: suitability for navigation	11
a. Velocity of current	12
b. Natural obstructions and channels	14
4. Actual navigation over the Wiley's Shoals-Radford stretch	18
a. The findings below	18
b. Respondent's treatment of the record	20
D. The courts below applied erroneous legal criteria of navigability	26
1. Difficulty of navigation does not defeat navigability	27
2. Irregularity of the traffic does not defeat navigability	28
3. It is immaterial that the traffic was an insubstantial part of commerce of the region	28
4. Abandonment of commercial navigation does not defeat navigability	29
5. Absence of commercial profit is immaterial	29
II. Respondent's project must be licensed because it will obstruct navigable capacity and affect the interests of interstate commerce	30
A. Impairment of navigable capacity	30
1. The Hinton-Glen Lyn stretch	30
2. The Kanawha and Ohio Rivers	31
B. The project will affect the flood-control plans for the Ohio valley	32

264995—40——1

Page

III. The challenged provisions of the Federal Power Act are constitutional 33
A. Congress may prohibit respondent's project 34
1. If New River is navigable 34
2. If the project adversely affects navigable capacity 34
3. If the program adversely affects the flood-control program 35
4. If the project affects the interests of interstate commerce 35
B. Congress has full power to impose the conditions required in licenses under the Federal Power Act 36
1. The scope of the constitutional issue 38
2. The conditions further a legitimate federal interest in water resources 39
(a) The Government could itself undertake the project and accomplish all of the conditions of the license 40
(b) The Congress may either prohibit the project or license its construction on conditions appropriate to a Government project 42
3. The charge of confiscation 44
(a) Power rights 44
(b) The recapture clause 46
Conclusion 49

CITATIONS

Cases:

Alabama Power Co. v. *Gulf Power Co.*, 283 Fed. 606 ..... 43, 46
Alabama Power Co. v. *Ickes*, 302 U. S. 464 38
Arizona v. *California*, 283 U. S. 423 ..... 29, 30, 40, 41, 42
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 ..... 28, 29, 41
Berea College v. *Kentucky*, 211 U. S. 45 38
Bogardus v. *Commissioner*, 302 U. S. 34 3
Broad River Power Co. v. *Query*, 288 U. S. 178 43
Economy Light Co. v. *United States*, 256 U. S. 113 ..... 6, 28, 29
Fox River Co. v. *Railroad Commission*, 274 U. S. 651 47
Helvering v. *National Grocery Co.*, 304 U. S. 282 3
Helvering v. *Rankin*, 295 U. S. 123 2
Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481 3
Labor Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 3
Leovy v. *United States*, 177 U. S. 621 3
Massachusetts v. *Mellon*, 262 U. S. 447 44
Montana Power Co. v. *Federal Power Commission*, 112 F. (2d) 371 48

Cases—Continued. Page

Montello, The, 20 Wall. 430 ... 3, 8, 27
New Jersey v. *Sargent*, 269 U. S. 328 ... 41, 48
Oakland Club v. *South Carolina Public Service Authority*, 110 F. (2d) 84 ... 43
Scott v. *Lattig*, 227 U. S. 229 ... 14
Steward Machine Co. v. *Davis*, 301 U. S. 548 ... 44
Susquehanna Co. v. *Tax Commission*, 283 U. S. 291 ... 43
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 ... 44
United States v. *Esnault-Pelterie*, 303 U. S. 26 ... 3
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690 ... 34
United States v. *Utah*, 283 U. S. 64 ... 8, 27, 28, 29, 30
United States v. *West Virginia*, 295 U. S. 463 ... 48
Water Power Co. v. *Water Commissioners*, 168 U. S. 349 ... 28, 29

Statutes:

Federal Power Act:

Sec. 3 (8) ... 3, 27, 28, 29
Sec. 10 (a) ... 36, 41
Sec. 10 (b) ... 36
Sec. 10 (c) ... 37, 41
Sec. 10 (d) ... 37, 41
Sec. 14 ... 37, 41, 44
Sec. 21 ... 46
Sec. 23 ... 36

Rivers and Harbors Act of 1899:

Sec. 9 ... 37
Sec. 10 ... 37

Virginia Acts of 1861–1862, Ch. 50 ... 23

Miscellaneous:

Annual Report, Chief of Engineers, 1876, Part II, p. 235 ... 8
49 Cong. Rec. 3058 ... 41
H. Doc. 2, vol. 16, 57th Cong., 1st Sess., pp. 3535–3536, Annual Report to the Chief of Engineers, 1901 ... 14
H. Doc. 182, 72d Cong., 1st Sess., p. 20 ... 6

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

THE UNITED STATES OF AMERICA, PETITIONER

v.

APPALACHIAN ELECTRIC POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The brief for the respondent raises a host of minor controversies over detail. These we shall not attempt to meet, lest a particularized rebuttal obscure the essential simplicity of the issues presented to this Court.[1] Instead, we shall attempt merely to provide a running outline of the major issues which are determinative of this case.

[1] It is perhaps desirable expressly to note that we do not concede that respondent is correct on the issues which are not developed in reply.

I

NEW RIVER AT THE SITE OF RESPONDENT'S PROJECT IS NAVIGABLE WATER OF THE UNITED STATES

A. THE CONTROVERSY IS ONE OF LAW

Respondent urges that the issues are those of fact, and that they are set at rest by the concurrent findings of the courts below (Br. 17–19, 30–31). On the contrary, we accept the concurrent findings of fact which were made by the courts below and present to this Court only the legal questions which arise on those findings.

The respondent's contention that we are foreclosed by concurrent findings is based upon a rather catholic use of the term "fact." If navigability itself were simply a "fact," like a horse or the height of a waterfall or the passage of a boat, the issue would ordinarily be considered closed by concurrent findings below. But it is, of course, not a fact in the sense of a physical object or an historical event. It is a conclusion which is derived by comparing (a) physical or historical facts, with (b) legal criteria. Cf. *Helvering* v. *Rankin*, 295 U. S. 123, 131. Where both courts below have agreed on the underlying physical or historical facts, those facts will not be reexamined here. But this by no means exempts from review the legal criteria applied to those facts by the courts below.[2]

[2] The decisions of this Court illustrate that no invariable and simple litmus can be applied to determine whether a given issue is one of fact or of law. It has held the validity

Certainly neither authority nor reason requires this Court to accept without reexamination a conclusion that a river is nonnavigable simply because it was reached by both lower courts. There has been a century of litigation in which the legal criteria of navigability have been announced by this Court, and Congress in Section 3 (8) of the Federal Power Act has supplied its own definition. We present to this Court simply the legal question whether these legal standards have correctly been applied to the facts of this river. For purposes of the review here, the concurrent finding rule may be taken to preclude reexamination of those basic findings which were reached by both courts. But it cannot preclude review of the legal consequences of those facts, or of the legal criteria which determine the conclusion as to navigability under the facts. *The Montello,* 20 Wall. 430, 442; *Leovy* v. *United States,* 177 U. S. 621, 628.

In the specific terms of this case, the problem is well illustrated by the two crucial conclusions of

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and infringement of a patent (*United States* v. *Esnault-Pelterie*, 303 U. S. 26, 29–31), the existence of an obstacle to collective bargaining (*Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271), and the purpose of an unreasonable accumulation of corporate surplus (*Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294–295) each to be a question of fact. On the other hand, it has held the questions of whether the consideration included cash (*Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491), and whether a payment was a gift or compensation (*Bogardus* v. *Commissioner*, 302 U. S. 34, 39), to be questions of law, or questions of mixed law and fact.

the Circuit Court of Appeals as to (1) actual navigation and (2) susceptibility of the stream to navigation. It said (R. 2903, 2893):

> The plaintiff has not shown that there was interstate navigation on New River *of such a substantial and permanent nature and of such general and common usefulness that it would subject the river to Federal servitude to the benefit of navigation.*
>
> * * * * *
>
> A mere description of the physical and natural characteristics of the river[3] is very persuasive that it is not suspectible *of that character of navigation which is necessary, under the decisions above cited, to support the claim that it is navigable water of the United States.* [Italics supplied.]

The italicized portions of these passages are plainly a decision based upon the legal definition of navigable water adopted by the court below. The specific rulings of law made by the court below which we challenge here are those which put aside the evidence of actual navigation and suitability to navigation because the navigation (a) was difficult,

[3] Here, as frequently was the case, the majority of the court below was speaking of New River generally, rather than the 111-mile stretch here in controversy. Thus when it speaks of depths of one foot or a few inches (R. 2893) or a slope of 7.1 feet per mile (R. 2895), it has reference to the entire river, not to the stretch here involved, with low water depths of 2 feet or more for 98 percent of the distance, and not less than one foot at any place, and rarely less than 2 feet, and with an average slope of 4.4 feet per mile (Govt. Br. 70, 64).

largely because of the interruption from a few shoals and rapids, (b) was irregular, (c) did not form an important part of the commerce of the region, (d) did not continue for a very long period, and has been substantially nonexistent since construction of the paralleling railroads, and (e) was not commercially profitable (see *infra,* pp. 26–30).

These rulings are each erroneous. This we shall briefly indicate after sketching the picture of New River and its navigation. But the errors of the courts below, in contrast to the dissenting opinion of Judge Parker, seem most easily shown if the opinions be read against the decisions of this Court in which other rivers have been held navigable notwithstanding the difficulties confronting navigation.

B. COMPARISON WITH OTHER RIVERS HELD NAVIGABLE

In three cases this Court has held navigable rivers which bear a close resemblance to New River. A brief discussion of the facts of those cases also shows that navigation was at least as easy on the 111-mile stretch of New River here in issue as on those rivers.[4]

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[4] Respondent offers charts by which to compare the slopes of these rivers with New River (Rsp. Br. 138, after Rsp. App. 237). The charts include all of New River, not merely those parts now in issue, and in some cases all of the compared rivers, not merely those parts in issue in the cited cases. Apparently because of the desire to include uncontroverted parts of the streams, the charts are cast upon an unnecessarily distorted scale. The length of the streams is

1. *The DesPlaines River.*—The portion of the DesPlaines River in controversy in *Economy Light. & Power Co.* v. *United States,* 256 U. S. 113, was about 45 miles in length, 60 per cent of which was pool water and 40 per cent shoals and shallow water. The discharge was as much as 600 c. f. s. during an average of only 73 days per year. The 58-mile trip from Chicago to the mouth of the DesPlaines River could be accomplished without portage during only 48 days of the year; the portage would be less than 2 miles for only 73 days of the year, and less than 4 miles for only 116 days. During the rest of the year, an average of 249 days, a portage of the boat itself would be required for 1 or 2 miles, and portages of the cargo from 11 to 15 miles according to the water stage.[5] With the exception of an average period of 4 days per year, the controlling depths over the rapids and shallows were never more than 15 inches from Lake Michigan to the mouth of the DesPlaines, and such controlling depths were found along the better stretches of the river only during an average period of 116.2 days per year. At all other times, the controlling

represented to a scale of approximately 1 inch per 50 miles, while the slope is represented on the scale of 1 inch to 260 feet. In other words, the distortion is approximately in the ratio of 1 to 1,000.

[5] Indeed, at some stages a portage over the entire length of the river was required. H. Doc. 182, 72d Cong., 1st Sess., p. 20, quoting from Graham and Phillips Report of April 4, 1819.

depths were 12 inches or less. 256 Fed. 722, 793–796.

Moreover, no navigation on the DesPlaines had taken place for almost 100 years. This being true, it was necessary to rely entirely upon historical data for proof of such navigation as had formerly existed.[6] From the evidence, the Circuit Court of Appeals found only 14 specific instances of the use of the DesPlaines for commercial navigation, ranging over a period of more than 150 years, between the years 1673 and 1830, although the record showed less well authenticated evidence of many other trips. The navigation consisted chiefly of fur trade, carried on in canoes and flat boats roughly similar to those in use on New River (256 Fed. at 797–798). Upon these facts the Circuit Court of Appeals came to the conclusion that the DesPlaines was navigable and it was upon this evidence that this Court held that the actual navigation on the river was such as to make it navigable water of the United States.

2. *The Fox River.*—Eighteen miles of the stretch of the Fox River under consideration in

[6] The respondent seems to make much of the fact that, aside from the few exploratory trips, we have not shown navigation on New River in the distant past, and it claims that lack of historical navigation constitutes evidence of nonnavigability (Rsp. Br. 44–45; Rsp. App. 39–53). The argument is erroneous. Where there is evidence of actual navigation within the memory of man, there is obviously no need of searching into historical records.

The Montello, 20 Wall. 430, had in their natural condition an average fall of approximately 8 feet per mile. Within this reach the maximum fall was 29½ feet within a distance of only ¾ of a mile, while within another stretch of 2½ miles there was a fall of 38 feet. (See Annual Report, Chief of Engineers, 1876, Part II, p. 235.) Such slopes are not to be found in the Hinton-Allisonia stretch of New River. Continuous navigation on the Fox River, by boats of shallow draft, was not possible because of the obstructions in the form of shallows, rapids, and falls, which made portages necessary. Prior to its improvement by locks and dams, the commerce on the lower Fox was conducted by Durham boats, propelled by animal power; and the boats were comparable in size, draft, and capacity to the keelboats used on the New River (20 Wall. at 441; Govt. Br. 59). The trial court held the entire lower Fox nonnavigable, but the decision was reversed by this Court.

3. *The Colorado River.*—In *United States* v. *Utah,* 283 U. S. 64, this Court reviewed and sustained the findings of Mr. Charles Warren, Special Master in the case, in respect of the Colorado River between Mile 176, above Lees Ferry, and the Utah-Arizona Boundary (about 150 miles). His findings were as follows:

> I do not find that these rapids have proved any substantial impediment to a boat going downstream. Rowboats going upstream must ordinarily be dragged or poled up

> through, but to a motorboat going upstream these rapids form little obstacle, except in times of extreme high water; wide rafts have found difficulty in going down through some of these rapids at low water, without hitting upon rocks. Irrespective of the rapids, the ordinary velocities of the River present some difficulty to boats making the upstream trip. Such velocities in the 50-mile stretch between the mouth of the San Juan and the boundary line are 3½–4 miles per hour for about half of the year and over 4½ for the remainder of the year. * * * Most of the witnesses who made trips in rowboats testified to being obliged to pole or drag their boats upstream in many places; and the up-trips were, as a rule, long and difficult, more particularly below the mouth of the San Juan where the volume and velocity of the water were greater. (Report of the Special Master in No. 14, Original, October Term, 1930, pp. 146–7.)

It seems evident that the controverted stretch of New River, equally with those discussed above, would similarly have been held navigable if the proper legal standards had been applied by the courts below.

C. THE FACTS OF NAVIGABILITY

1. *The Allisonia-Radford and Wiley's Shoals-Hinton Stretches.*—Respondent seems unwilling to admit that these two stretches, of 28 and 27 miles respectively, are navigable; it does not, however,

affirmatively urge that they are nonnavigable (Rsp. Br. 41–43). Both courts below, by clear inference, held these stretches to be navigable (R. 114, 115, 2900–2902). The evidence, summarized in our main brief (Govt. Br. 35–38), shows that these stretches were extensively navigated and constitute navigable waters of the United States.

The only controversy raised by respondent is as to the distance above Hinton which should be included in the plainly navigable stretch.[7] Respondent prefers to place its end[8] at Round Bottom Creek, where the Virginia-West Virginia state line crosses New River.[8] But its own chart (opp. Rsp. Br. 50) shows that the federal improvement extended beyond respondent's location of the state line, and the court below held (R. 2901) that the improved stretch reached for something less than a mile into Virginia.[9]

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[7] This is important only with respect to our argument (Govt. Br. 79–81) as to impairment of the navigable capacity of the interstate stretch between Hinton and Glen Lyn.

[8] The location of the state line cannot seriously be challenged by respondent. Its own property map (Ex. No. 188, Vol. I, 9) and the latest U. S. Geological Survey map (Ex. 185, Vol. I, 8) alike show the state line at Round Bottom Creek, 24.5 miles above Hinton; it persists, however, in placing this line one mile upstream, at Wiley's Falls, although this is demonstrated by the record to be erroneous (R. 1140–1150).

[9] The District Court perhaps implied, but certainly did not hold, that the navigable stretch extended only 23 or 24 miles above Hinton (R. 114). But it is undisputed that a ~~slack-water pool~~ two foot channel reached from McDaniel's Falls, 18 miles above Hinton, to Wiley's Falls, 26 miles above Hinton (Ex.

2. *The Radford-Wiley's Shoals Stretch.*—This leaves for consideration only the 56-mile stretch of New River between Wiley's Shoals and Radford. We shall indicate the general nature of the facts shown by the record and found by the lower courts as to the physical characteristics of this stretch and as to the actual navigation over it. Then we shall show that the legal definition of navigable waters of the United States is fully applicable to that portion of New River.

3. *Physical Characteristics: Suitability for Navigation.*—The next section will sketch the substantial commercial navigation recognized by the lower courts to have moved over this 56-mile stretch of New River. This navigation, even if ignored as proof of actual navigation, should be conclusive that the river was *suitable* for navigation and therefore navigable (Govt. Br. 61–62). In this section, however, we shall examine the physical characteristics of the river and shall show, without the aid offered by the extensive evidence of actual navigation, that on the concurrent findings of the courts below this stretch of New River should have been held suitable for navigation and therefore navigable.

Since there is no question that the water-flow is sufficient for navigability (Govt. Br. 62–63), the question is simply whether (a) the velocity of the

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196, Vol. I, p. 2) and that the federal improvement reached through Wiley's Falls to Wiley's Shoals, 27 miles above Hinton (Ex. 38, R. 2383; Ex. 39, R. 2395).

current is too great, or (b) the obstructing shoals and falls are too formidable to permit navigation. Neither is the case.

(a) *Velocity of Current.*—One of the factors which determine velocity of current is the slope of the river. Neither court below made a finding as to the slope of the river in the Allisonia-Hinton stretch (see R. 114, 2895, 2900–2901). We do not understand that respondent questions that the average slope in this entire stretch is 4.4 feet per mile, or that it is 3.8 feet in the Hinton-Wiley's Shoals stretch, 5.0 feet in the Radford-Allisonia stretch, and 4.4 feet in the intervening Wiley's Shoals-Radford stretch (Govt. Br. 64; Rsp. App. 8–18). Instead, it selects isolated portions of the middle stretch which have a much greater slope than the average and offers these portions as characteristic.[10] Since we do not deny the existence of a number of shoals and rapids which appear in this stretch, or that the slope is considerably greater than the average in occasional places, there is no controversy over the slope of the part of New River here in issue.

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[10] Respondent relies upon Ex. No. 196, Vol. I, which in turn is based upon the Hutton survey of 1872 (Ex. 31, R. 2280–2289). That survey shows that in the plainly navigable Allisonia-Radford stretch one mile has a fall of 13 feet and another a fall of 10 feet (miles 27 and 32; R. 2283). In the Radford-Wiley's Shoals stretch, reaching twice as far, the two worst miles are those with a fall of 11 and 10 feet, respectively (miles 100 and 65; R. 2286, 2285).

Velocity of current, of course, is not fixed by slope alone, but is also influenced by channel depth and width. Therefore the best evidence of velocity is direct measurement. A Government witness, using a current meter (R. 930), measured the river velocities at each of the 41 rapids and shoals in the Wiley's Shoals-Radford stretch; his results show current velocities varying from 1 to 4.4 miles per hour (Govt. Br. 70). Respondent abuses the witness,[11] but has offered at no point in the extensive record any measurements to show that the velocities were in fact greater than those shown by the Government's measurements.

The District Court made no finding as to velocity, but the Circuit Court of Appeals found that there were "pools of comparatively still water", and that "the stream velocity varies at the shoals and rapids from 3 to 5 miles per hour"[12] (R. 2895).

The only finding made by the courts below, and the only evidence in the record, therefore, indicates

[11] The abuse is unwarranted. One need only glance through the cross-examination from which respondent has culled isolated sentences (Rsp. App. 22–24; R. 930–934) to see that the witness was in no sense discredited by questions directed only to that end. Respondent's use of the District Court's criticism of the Government's testimony on power waves (R. 130–131) to discredit testimony on other parts of the case (Rsp. App. 29) is transparently unfair.

[12] Even this statement of the court below gives an exaggerated picture of the velocity, since it is a paraphrase of an engineer's survey of the upstream stretch between Lead Mines and Wilson Creek, which we do not now contend to be navigable (R. 2350).

264995—40——3

that the maximum velocity, at the worst of the rapids and shoals in the Radford-Wiley's Shoals stretch, is 5 miles per hour or less. While we recognize that navigation would be difficult or uncomfortable at occasional shoals, the velocity of 5 miles per hour or less is, even at these places, well within the limits of navigability (R. 276, 927, 1102, 2296, 2367).[18]

(b) *Natural Obstructions and Channels.*—The District Court mentioned the shoals and rapids found in New River, but in no case did it confine its discussion of these obstructions to parts of the river within the 111-mile stretch now in issue (R. 108, 117). The Circuit Court of Appeals placed considerable emphasis upon these shoals and rapids (R. 2900–2901). Neither court estimated the total length of these shoals nor the average depth in the channels through them. Government witnesses estimated that the shoals extended over 15 per cent of the Wiley's Shoals-Radford stretch (R. 905, cf. Ex. 31, R. 2282–2287). Respondent urges that they cover more than a third of the distance (Rsp. App. 32–36). The controversy, which doubtless turns on

[18] In the 73-mile reach of the navigable Snake River (*Scott* v. *Lattig*, 227 U. S. 229, 239, 242) between Riparia, Washington, and Lewiston, Idaho, the Army Engineers in 1901 reported 37 rapids or bars totalling 15 miles in length or 21% of the entire reach. The minimum velocity found over these rapids was 4 miles per hour and the maximum velocity 8.08 miles per hour. (Annual Report of the Chief of Engineers, 1901, pages 3535, 3536, 57th Cong., 1st Sess., H. Doc. 2, Vol. 16.)

the point where a shoal can be said to end is immaterial. The only question of importance is the extent to which there are navigable channels through the shoals.

Respondent apparently does not urge in terms that channels through the shoals are nonexistent, even in the natural state of the river, or that they were impassably narrow, but rather that the water depth was too shallow for navigation over the ledges and shoals (Rsp. App. 36–39). It relies for this solely upon various reports of the Army Engineers. All of these except one describe the entire New River [14] or the stretch reaching from Hinton all the way to the North Carolina line.[15] The one report relating to the 111-mile stretch now in controversy, heavily emphasized by respondent (Rsp. App. 37), is directed specifically at a shoal in the plainly navigable Allisonia-Radford stretch.[16]

Respondent's reliance upon the Engineer's reports, moreover, defeats its purpose, for their descriptions of the low water over the shoals and rapids are applicable equally to the plainly navigable Allisonia-Radford and Wiley's Shoals-Hinton stretches as well as to the Radford-Wiley's

[14] Conklin Report, 1934 (R. 2710).

[15] Reports of Chief of Engineers, 1881 (R. 2370, 2376); 1882 (R. 2382); 1883 (R. 2394); 1885 (R. 2405); 1886 (R. 2407); 1891 (R. 2413); 1897 (R. 2416). The reports, it is true, each repeat that the conditions obtain "throughout this distance," but are plainly not directed to the specific stretch in controversy.

[16] Cuyler Report, 1879 (R. 2339–2340).

Shoals stretch.[17] The only report which is directed specifically at the stretch now in issue is that of Major Altstaetter in 1912. He said (R. 2422):

> * * * From a study of the gauges at Radford and Hinton and other sources it appears that *at extreme low water*[18] the controlling depths over the bars may drop to less than 1 foot. This is due to the great rapidity of the current, the drop between these two places being about 348 feet. The headwaters of the river being in some of the highest mountains east of the Rockies a good discharge is ordinarily maintained, *and 2 feet found over the bars.*
>
> From Hinton to the vicinity of Glenlyn a boat drawing 2 feet will have sufficient depth of water for navigation *at practically all times. Mean stage conditions give 3 feet over nearly all bars.* The river, however, partakes of the characteristics of a mountain stream, with very rapid current and bad rapids, and therefore navigation is dangerous on it. [Italics added.]

The only actual measurements offered in evidence were those of a Government witness which

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[17] The 1873 report stated that "the extent and kind of improvement required for the betterment of the river is about the same throughout" (R. 2296).

[18] The italicized qualification also serves to reconcile the otherwise divergent reports as to the shoal depths. The Conklin report of 1934, as does the Altstaetter report of 1912, expressly relates its estimate of minimum depths to low water. The controlling depths "at practically all times" are shown by the latter report to be considerably greater.

showed, at ordinary summer low water flow (R. 906), that only at four places would the channel depths fall below 2 feet (Govt. Br. 70–71).

The District Court made no finding as to channel depths; the Circuit Court of Appeals described the entire river, not the stretch here in issue, in terms of shoals which frequently had only a few inches of water (R. 2893, 2895). When speaking of the stretch between Radford and the West Virginia line, it said the river had "serious obstacles to navigation * * * consisting of several difficult falls, and many long rapids and shoals" (R. 2900), but it did not find these to be impassable or the water depths to be inadequate.

It seems to us that a fair appraisal of the evidence and the statements of the court below would indicate that there were several falls or shoals which would be rather difficult to navigate during periods of high water, and which would doubtless require portage or pulling the boat in times of extreme low water. We do not see that the legal conclusion of navigability will vary whether these difficult stretches numbered two, six, or a dozen in the 56-mile stretch. But, if this number be material, it is to be noted that neither court below made a finding on this question and that the only definite evidence in the record shows that there are only three or four shoals or rapids which would introduce exceptional difficulty to navigation (Govt. Br. 70–

71), and these shoals constitute less than 3 percent of the 111-mile stretch (R. 905).[19]

4. *Actual Navigation Over the Wiley's Shoals-Radford Stretch.*—We think that there is no occasion for this Court to go behind the findings of the lower courts on the facts of actual navigation. If the record facts should be material, however, we must point out that they are seriously distorted by respondent.

(a) *The Findings Below.*—Neither court below denied the existence of actual navigation over this stretch of New River. The District Court, in contrast to the respondent (Rp. Br. 47–56, Rsp. App. 96–135) and the Court below (R. 2902), not only did not reflect on the credibility of the many witnesses who testified to this navigation, but in terms recognized this navigation. However, the court said (R. 114):

> there is a vagueness about the extent to which it occurred and indications that such trips were irregular, were attended with difficulty, and formed no appreciable part of any commercial transportation which took place on the river.

---

[19] We shall not prolong the controversy as to whether the Government's or the respondent's photographs more truly represent the shoals in New River (cf. Govt. Br. 72, Resp. Br. 40, Resp. App. 24–29). Either collection of photographs shows a river easily navigable except for several difficult but not necessarily impassable shoals, one or two of which might indeed be impassable at moderately low water.

The depth at Sifford's Falls, it may be noted, is erroneously printed as "1 to 8" feet instead of 1 foot in the tabulation in our main brief (Govt. Br. 70).

The Circuit Court of Appeals similarly recognized this navigation but approved the finding of the District Court and, in addition, declared (R. 2903):

> such trips could be made only at particular times when there was unusually high water; that even then navigation was not only difficult but dangerous; that while the boats at times may have carried some country produce there was nothing like an established trade and commerce * * *; and that the duration of such use of the keelboats was for a few years only and has been nonexistent for more than 50 years. * * * there was also testimony of nonexpert witnesses submitted by the defendant to the effect that the attempt to commercially use keelboats was unsuccessful and unprofitable * * *.

In terms of concurrent findings, both courts, then, have found (a) there was some navigation; (b) it was difficult; (c) it was irregular; and (d) the Wiley's Shoals-Radford stretch did not at any time form an important artery for the actual commercial transportation of the region. We do not attack these concurrent findings. We do submit that, as a matter of law, these findings show that New River was navigable in this 56-mile stretch.

The Circuit Court of Appeals evidently felt that something more was needed to show nonnavigability. It introduced the following statements of fact and law, which were neither found nor made the basis of legal conclusions by the District Court: (a) navigation was possible only at times of unusually high water; (b) the navigation was short

lived and has been nonexistent for 50 years; and (c) it was not commercially profitable.

The propositions of law introduced by the Court of Appeals are shown in the next section to be wrong. The added statement of fact, that navigation was possible only at times of unusually high water, is *not* a concurrent finding of fact and is contradicted by the record [20] (Govt. Br. 53–54).

There is, then, no need to plunge into the extensive record of this case to determine the precise extent of the navigation over this stretch of the river. We are content to rest on the findings of actual navigation made by both courts below.

(b) *Respondent's Treatment of the Record.*—However, we are not willing to allow to go unchallenged respondent's intemperate attack upon Judge Parker's summary of the evidence (Rsp. Br.

[20] Respondent attempts to support this finding by reference to isolated statements that a "tide" was necessary for satisfactory navigation (Rsp. App. 120–122). But this condition of the river, the testimony of many of these witnesses and of other witnesses shows, meant simply a stage of the river which was above the extreme summer low water. Howard (R. 217); Collins (R. 220); Breeding (R. 259–260); Redpath (R. 275); Farmer (R. 292); Smith (R. 361); Medley (R. 380); Snodgrass (R. 304); Lane (R. 396); Smith (R. 398); Kenley (R. 401–402); Reed (R. 407). Respondent's own witness Knode stated that a trip down to Hinton was accomplished at "ordinary, not extra high" tide (R. 1572). So, too, the engineers' reports make plain that the low water which stopped navigation was simply the low water of summertime and not, as respondent would have it, anything less than a "flood tide." See 1880 Report (R. 2361); 1882 Report (R. 2385).

52–56) or its procrustean operations upon our tabulation of the evidence (Rsp. Br. 48–52).

A fair means of illustrating the liberties respondent has taken with the record, without too greatly expanding this brief in order to reply to an irrelevant charge, is to take the first item under each of the six categories of reasons which respondent offers (opp. Rsp. Br. 51) for eliminating evidence from our tabular summary of the record (found opp. Govt. Br. 48).

(1) "Incorrect Use of Testimony as Actually Recorded": The first of 55 items eliminated under this heading is line 2 B, representing navigation from Hinton to Glen Lyn, Virginia (Govt. Br. 178; R. 482–485). The witness Calloway testified that construction material for the Norfolk & Western Railroad was shipped to Hinton by railroad and boated up to a place between East River and Glen Lyn. The only possible inaccuracy in our use of this testimony is calling the destination Glen Lyn instead of a point $\frac{1}{5}$ to $\frac{1}{10}$ of a mile downstream from Glen Lyn.[21]

[21] Respondent also attacks the testimony of this witness because he stated that a man "came there with his auto" during the period 1881 to 1884 to supervise the loading and shipment of the material up the river (Rsp. Br. 50). This is a natural slip of the tongue, made after a generation of auto transportation. In any event, Calloway's testimony was supported by the testimony of the witness Reed, who actually operated the boats (R. 405–407); by Peters, who transported supplies to the Norfolk and Western Railroad (R. 319–320); by Dickinson, who saw the shipment of the material (R. 393); and by the reports of the Chief of Engineers: 1885, R. 2406; 1882. R. 2393.

(2) "Duplication": The first of 23 items eliminated under this heading is line 3 B, representing navigation from Mack's Creek to New River Bridge, near Radford (Govt. Br. 178; R. 218). Respondent says the trip is duplicated by line 3 A, representing navigation from Mack's Creek to Hinton (R. 218). This item, alone of those discussed here, permits an arguable justification for respondent's elimination. The witness Collins testified that "they used to run from eight to ten of these boats from Mack's Creek on New River down to New River and from New River to Hinton" (R. 218). This might be a technical duplication if the same boats invariably continued on to Hinton after stopping at New River Bridge, but it seems more probable that the boats frequently terminated their journey at the New River Bridge depot, as the testimony would equally imply.[22]

[22] The testimony of this witness of navigation by bateaux between Mack's Creek and Hinton, relied upon by Judge Parker (R. 2926–2927), which the witness personally observed as a passenger on the boats operated by his father, is attacked by respondent because Collins stated that the shoals and ledges in a portion of this reach of the river had "wing walls and channels and sluices through them" (Rsp. App. 133). The witness first stated that "there was a sluice through there" and that one shoal had a "wing dam" (R. 220–221). Then respondent's counsel placed the words "wing walls, channels, and sluices" in the mouth of the witness in his question, to which the witness answered in the affirmative (R. 221). Moreover, respondent's statement that there was no improvement in the 60-mile section between Radford and Wiley's Falls (Resp. App. 133) is incorrect. This section of the river was improved to some extent by

(3) "Hearsay": The first of 27 items eliminated under this heading is line 2 A, representing navigation upstream from Hinton (Govt. Br. 178; R. 482–485). The witness was assistant to the freight manager at the Hinton station of the Chesapeake & Ohio Railroad and testified that freight consigned to Hinton was boated upstream. Naturally, he did not leave the station to see if the freight actually went up the river (R. 484); equally naturally, his knowledge of the intended route of the freight is the full equivalent of actual observation. Judge Paul emphatically overruled hearsay objections of this nature.[23]

(4) "Non-Commercial Items": The first of 10 items eliminated under this heading is line 4 C, representing navigation from Mack's Creek to Hinton (Govt. Br. 178; R. 252). The goods transported were government property used in cutting the chan-

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the State of Virginia during the war between the states, as is evidenced by the Report of the Chief of Engineers for 1879 (Ex. 35, R. 2342). (See also Virginia Acts of 1861–1862, Ch. 50.) The War Department reported that this improvement by the Confederate States had been "injudiciously located and poorly built" (R. 2342).

[23] He said (R. 262): "Mr. Abbott, as far as the hearsay feature of it is concerned, there are certain things that can only be proven by hearsay. Suppose someone would ask you about where your older brother had gone to college and he had gone to Princeton. You may not have gone to Princeton, and you may never have seen him when he was at Princeton. Certainly you would be able, if testifying, to say where he had gone. * * * Some things can only be proven that way, particularly things of this nature. * * *"

nel, boated down to Hinton for the purpose of sale. Only fine-spun constitutional theory would suggest that the items were "non-commercial" because the Government rather than a private person was the vendor.

(5) "Testimony Inconsistent With Other Evidence in the Case": The first of 8 items eliminated under this heading is line 6 C, representing navigation from Hinton to Shumate's Falls (Govt. Br. 178; R. 393[24]). The witness Dickinson testified that the Norfolk & Western Railroad boated its construction supplies over this reach; Judge Parker accepted his testimony (R. 2927). Respondent cites as inconsistent evidence: testimony as to the construction of *another* railroad at a point about 50 miles upstream from the construction in question (R. 1650); testimony from the same witness that the *stone* for the Norfolk & Western abutments was shipped downstream from Pepper's Ferry, 46 miles upstream and just below Radford (R. 1652); testimony that this same witness did not know for a fact that the supplies were shipped up from Hinton, although he did *not* know that they were not so shipped (R. 1654); and a general reference to seven pages of argument in its brief (Rsp. App. 100–107) which need not be analyzed in detail.

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[24] The record reference is erroneously given as R. 394–395 in both our brief (p. 178) and that of respondent (opp. p. 51).

It is to be noted again that Judge Paul did not in any way reflect upon the credibility of any of these witnesses (see R. 114).

(6) "Testimony Inconsistent With Well-Known Facts": The first of 10 items eliminated under this heading is line 1 A, representing navigation from Eggleston's Springs, to True, West Virginia (Govt. Br. 178; R. 458). Respondent seeks (Rsp. App. 133) to impeach the testimony of the witness Anderson, which was accepted by Judge Parker (R. 2926), for two reasons: (a) because the witness first stated that the trip which he was describing was made in 1870, when as a matter of fact it was made in 1879, and (b) because he stated that the trip was made at night. (a) But almost in the next breath after referring to the year 1870, the witness, without comment or suggestion or questioning by counsel or by the court, stated that the trip was made in 1879 (R. 459). (b) The witness' statement that this trip was made at night is completely corroborated by the testimony of *respondent's* witness Talbott, who testified that boatmen made the down-stream trips at night (R. 1542).

Respondent undertakes to deny that the reason for the cessation of navigation was the construction of paralleling railroads (cf. Govt. Br. 37–38, 52; Rsp. App. 137, 140). The Engineers' Reports (1891, R. 2756–2757; 1913, R. 2431) and a mass of

testimony [25] must completely be disregarded if respondent's position is to be accepted. The District Court made no finding on this point; the court below indicated at least a probable agreement with our position (R. 2903).

D. THE COURTS BELOW APPLIED ERRONEOUS LEGAL CRITERIA OF NAVIGABILITY

We have, then, a relatively simple factual picture, established both by the concurrent findings of the courts below and by the indisputable evidence in the record: Of the 111 miles between Hinton and Allisonia, the 27 miles above Hinton and the 28 miles below Allisonia seem plainly to be navigable. The intervening 56-mile stretch does not differ appreciably in its physical characteristics from these stretches; its slope, natural obstructions, and water volume are substantially the same. A passable channel exists through all except a very few of the shoals and rapids. The actual commercial navigation on this stretch of the river has been considerable and amply demonstrates both navigation in fact and susceptibility to navigation. Yet the courts below have minimized or ignored the legal weight of this navigation because it (a) was difficult, (b) was irregular, (c) did not form an important part of the commerce of the region, (d) did

[25] Harvey (R. 186); Linkous (R. 205); Howard (R. 210); Breeding (R. 255); Snyder (R. 263); Farmer (R. 295); Snidow (R. 302); Snodgrass (R. 304); Skeen (R. 340); Flanagan (R. 469).

not continue for a very long period, and has been substantially nonexistent since construction of the paralleling railroads and (e) was not commercially profitable.

We do not contest the fact that each of these limitations upon New River navigation existed. We do contest the legal proposition that they are sufficient to prevent this interstate stretch of the river from being held to be navigable waters of the United States. Judge Parker, recognizing these facts, concluded that the river was navigable. The only issue presented as to navigability, we believe, is the question of law as to the standards by which navigable waters of the United States are to be determined. Under both the Federal Power Act and the decisions of this Court that question was wrongly decided below.

1. *Difficulty of Navigation Does Not Defeat Navigability.*—The only factor which makes New River navigation difficult is the presence of shoals and rapids; in the 56-mile stretch there are a few places which during the low water months might require unloading a keelboat drawing 2 feet of water, and a number of places where navigation would not be easy. Section 3 (8) of the Federal Power Act in terms declares streams to be navigable "notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage." This Court has repeatedly applied the same judicial definition. *The Montello,* 20 Wall. 430, 443 (where

portages up to 2 miles were necessary); *Economy Light Co.* v. *United States*, 256 U. S. 113, 122 (where portages from 2 to 11 miles were generally necessary); *United States* v. *Utah*, 283 U. S. 64, 86; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 329; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 359 (Govt. Br. 57, 66–67).

2. *Irregularity of the Traffic Does Not Defeat Navigability.*—Section 3 (8) of the Federal Power Act declares that navigable waters of the United States means streams which "are used or suitable for use for the transportation of persons or property in interstate or foreign commerce." An irregular use, obviously, is both a use and persuasive evidence of suitability for use. Nor do the decisions of this Court import any requirement that the river traffic must move on a regular schedule or be continued in approximately uniform volume from year to year. *United States* v. *Utah*, 283 U. S. 64, 82, is conclusive that sporadic navigation, interrupted by long periods of complete disuse, is sufficient (Govt. Br. 57–58).

3. *It is Immaterial That the Traffic Was An Insubstantial Part of Commerce of the Region.*—So long as there be a real commercial use of the river, which neither court below has denied, it is wholly immaterial what proportion of the commerce of the region is carried on the river. Section 3 (8) of the Federal Power Act defines navigability in terms of streams which are "used or suitable for use." A small commerce, equally with a large,

shows both use and suitability for use. And the decisions of this Court compel the same conclusion. *United States* v. *Utah,* 283 U. S. 64, 79, 82 (lumber rafts on the Grand River; only occasional commercial trips on the Green and Colorado Rivers); *Water Power Co.* v. *Water Commissioners,* 168 U. S. 349, 359 (logs and rafts). In *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 329, the Court found the Tennessee River navigable although it "in its present condition * * * is not adequately improved for commercial navigation, and traffic is small."

4. *Abandonment of Commercial Navigation Does Not Defeat Navigability.*—Section 3 (8) of the Act, in speaking of streams which "are used or *suitable for use*" excludes any thought that abandonment of actual use, which leaves suitability for use unaffected, can destroy navigability. And it has been conclusively settled that a river does not become nonnavigable because its commercial navigation has been abandoned. The Des Plaines River had been out of use for almost a century, "but a hundred years is a brief space in the life of a nation," and if federal control of navigable waters is to be abandoned "it is for Congress, not the courts, so to declare." *Economy Light Co.* v. *United States,* 256 U. S. 113, 124; see also *Arizona* v. *California,* 283 U. S. 423, 453–454.

5. *Absence of Commercial Profit is Immaterial.*—The suggestion of the court below, that the unprofitable nature of New River navigation

means the river is nonnavigable, has been accepted in no other case and does not seem to be explicitly urged by respondent in this Court. The notion that the United States has jurisdiction only over streams which carry a profitable navigation finds no support in the Act and is contradicted by the decisions of this Court. See *Arizona* v. *California,* 283 U. S. 423, 453–454; *United States* v. *Utah,* 283 U. S. 64, 79, 82.[26]

Every one of the legal grounds advanced by the courts below, therefore, is contradicted both by the Federal Power Act and the decisions of this Court. Had the lower courts applied the correct legal standards to the facts of New River as they understood them, their conclusion would of necessity have been that the 111-mile stretch now in issue was navigable water of the United States.

II

RESPONDENT'S PROJECT MUST BE LICENSED BECAUSE IT WILL OBSTRUCT NAVIGABLE CAPACITY AND AFFECT THE INTERESTS OF INTERSTATE COMMERCE

A. IMPAIRMENT OF NAVIGABLE CAPACITY

1. *The Hinton-Glen Lyn Stretch.*—We have stated that there is no dispute but that the respondent's project will impair whatever navigable

[26] In *United States* v. *Utah,* the Special Master, affirmed by this Court, specifically found that navigation on the Green River was unprofitable, and specifically ruled that this factor was immaterial. Report of Special Master, No. 14, original, Oct. term, 1930, pp. 110–111.

capacity exists in this stretch (Govt. Br. 79–80). Respondent, relying upon an ambiguous sentence in the majority opinion below (R. 2909) does actually deny this self-evident fact (Rsp. Br. 63–64) but offers no reason to explain why an intermittent rise and fall of 4 feet or more would not impair navigation over a 2 to 3 foot channel (Govt. Br. 79–80). And, as we have shown (Govt. Br. 80–81), this interstate stretch of New River is navigable as a matter of law (see *supra*, p. 10).[27]

2. *The Kanawha and Ohio Rivers.*—In our main brief we attempted to paint a picture of the effect of respondent's project upon the navigable capacity of the Kanawha and Ohio rivers; we had hoped to put this beyond controversy by relying upon respondent's witnesses and upon undisputed evidence (Govt. Br. 77–79, 81–85). In this we underestimated the possible extent of controversy; respondent vigorously attacks both our facts and our conclusions (Rsp. Br. 63–83; Rsp. App. 164–178). Whether or not respondent's intended method of operation will impair downstream navigable capacity seems to us to be a question of fact. Although

[27] Respondent emphasizes that the proposed Bluestone dam will completely eliminate navigation between Hinton and Glen Lyn (Rsp. Br. 64). It is not entirely clear whether this dam will be equipped with a barge-lift, since the plans include that as future installation (R. 1350, 1387). But, in any event, the dam will create a slack water pool, wholly navigable, extending upstream for 36 miles when the dam is full (R. 1350). This pool will reach well across the state line and beyond Glen Lyn.

the concurrent findings of the court below seem to us to be erroneous, we do not at this juncture of the case ask the Court to go behind those findings.[28]

This leaves only the two legal questions: (a) whether the courts below correctly looked to respondent's *intended* method of operation instead of its possible method of operation; and (b) whether the effect of downstream dams can properly be relied upon in the inquiry as to impairment of navigable capacity. These rulings we have shown to be erroneous (Govt. Br. 85–89). If the lower courts were held wrong on this ground, there would be no findings as to the fact of impairment of the navigable capacity of these rivers, since their findings were interwoven with their legal premises.

B. THE PROJECT WILL AFFECT THE FLOOD CONTROL PLANS FOR THE OHIO VALLEY

Respondent, we think, does not successfully eliminate the rather evident fact that its project will have an adverse or a beneficial effect upon flood control according to the manner in which it is operated (Govt. Br. 109–112; see Rsp. Br. 89–91). Indeed, any uncontrolled dam and reservoir of necessity is plainly a menace to a flood-control program.

The project *can*, it is true, aid in flood control if the reservoir waters are drawn down prior to the flood and the flood stages reduced by storage. But, on the other hand, if the reservoir is full when the

[28] It should specifically be noted that these findings do not cover the effect of respondent's project upon flood control and the impairment of navigable capacity thus resulting.

flood crest reaches the project, it will be of no aid and may well be of considerable harm. Since the respondent insists (Rsp. Br. 90, 91, 110, 117) that it is operating a project for power and not for flood control, there will be occasions when it will hold the reservoir full to the last minute and then accentuate the flood damage by the release of stored water on the flood crest (R. 625–626, 987–990, 1289). Regulation by a federal agency will prevent this method of operation.

In the event of a concurrent flood over other tributaries of the Ohio, the problem is much more complicated. In that situation the desirability of lowering the Radford reservoir in advance of an approaching flood must be weighed in the light of the flood crest from other tributaries of the Ohio River. Releases from all of the reservoirs on these tributaries must be coordinated and timed so that the crest from the several streams will not reach the main stem of the Ohio at the same time. An integration of flood-control operations is absolutely essential. One central authority must therefore determine when and to what extent the reservoir is to be lowered. Because floods do not respect State lines, this authority must be vested in some agency of the Federal Government.

III

THE CHALLENGED PROVISIONS OF THE FEDERAL POWER ACT ARE CONSTITUTIONAL

Respondent urges two general grounds of invalidity, if the Federal Power Act be construed to

apply to its project. First, that there can be no constitutional authority to require a license for a project on a nonnavigable stream, especially if the project does not impair navigable capacity (Rsp. Br. 107–120). Second, that if a license could be required, its conditions could not go beyond the protection of navigation (Rsp. Br. 121–138). Neither argument is valid.

A. CONGRESS MAY PROHIBIT RESPONDENT'S PROJECT

1. *If New River Is Navigable.*—Respondent vigorously asserts various limitations upon the power of the United States over navigable waters (Rsp. Br. 109–110), but it does not and cannot deny the full power of Congress to forbid structures erected in navigable waters of the United States.

2. *If the Project Adversely Affects Navigable Capacity.*—We should have thought that *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, settled the power of Congress to forbid or license structures in nonnavigable streams which threaten downstream navigable capacity.

Respondent contends (Rsp. Br. 113–116) however, that while Congress has power to prohibit the construction of projects in navigable waters, it cannot make the construction of a dam on nonnavigable waters "illegal *per se*", but may only forbid such operation of the dam as would impair navigable capacity downstream. It is somewhat difficult to understand the point of the argument since, wherever the project is located and what-

ever term is applied to it, the power to forbid is based on the power to protect navigation and navigable capacity. The contentions of both the respondent and petitioner as to the power of Congress to license the project on the conditions prescribed by the Federal Power Act are equally applicable whether the project is called illegal *per se* or whether it is forbidden because it threatens to impair navigable capacity.

3. *If the Project Adversely Affects the Flood Control Program.*—We have shown that the independent authority of the United States with respect to flood control alone, divorced from navigation, need not be considered in this case because floods on the New, Kanawha and Ohio rivers have an immediate impact upon navigable capacity and navigation facilities (Govt. Br. 104–106; *supra,* pp. 32–33). If the project will adversely affect the flood control program, then, it will also adversely affect navigable capacity and navigation facilities. The analysis of the preceding subsection is therefore fully applicable.

4. *If the Project Affects the Interests of Interstate Commerce.*—We have urged that the Federal Power Act requires that respondent's project be licensed even though its effect upon navigable capacity or flood control programs might under some plans of operation be beneficial rather than adverse (Govt. Br. 94–101). That argument need not be repeated here, nor need we answer respondent's attack (Resp. Br. 91–95) upon that construction

of Section 23; the issue is the familiar inquiry, largely unaided by the legislative history, whether or not Congress meant its language to be taken in a broad or a narrow sense. If the Court should agree with our construction of the Act, and if it should find the project would not have an adverse effect but rather might have a beneficial and possibly an adverse effect upon navigable capacity and flood control according to its method of operation, we submit that Congress still has power to prohibit or to license its construction. Since an uncertain or intermittent benefit is the practical equivalent of an adverse effect, the argument is the same as though navigable capacity or flood control were impaired. And, even if the effect of the project be viewed as purely beneficial, there is yet power to prohibit; our argument on this score has already been made at length (Govt. Br. 94–112).

B. CONGRESS HAS FULL POWER TO IMPOSE THE CONDITIONS REQUIRED IN LICENSES UNDER THE FEDERAL POWER ACT

Respondent makes a general attack upon all conditions of the licenses which are claimed to be unrelated to the protection of navigable waters or which, although related to navigability, restrict the use of its property without the payment of compensation (Rsp. Br. 122–123). In particular, respondent attacks (a) the requirement that the project be best adapted to a comprehensive plan for navigation, power, and "other beneficial uses" (Sec. 10 (a)) and (b) the recapture clause and

related provisions permitting the Government, on expiration of the license period and after two years' notice, to take over the project on paying the licensee's net investment (Sec. 14) and providing for the maintenance of the project and reduction of net investment while the project remains under private management (Secs. 10 (c)—10 (d)).

Respondent's objections to the conditions required in licenses under the Federal Power Act seem to be a blend of commerce clause and due process objections (Rsp. Br. 121–128). As we understand its position, it may be epitomized as, first, an objection that the federal government can impose no condition which is unrelated to navigation and, second, an objection that the conditions amount to a taking of its property without just compensation. The brief of North Carolina,[29] *amicus curiae,* urges the first of these propositions (N. C. Br. 8–12, 15–24).

It may be observed at the outset that respondent is in no position to attack these conditions if its project is located in navigable waters of the United States or impairs the navigable capacity of those waters. In either case construction of its project is forbidden by Section 9 or 10 of the Rivers and Harbors Act of 1899. Whatever success might attend respondent's attack upon the Federal Power

[29] The page proof of the brief indicates that other parties are expected to be signatory in its final form.

Act, it would therefore still be subject to the injunction prayed by petitioner. Since respondent would gain no relief from a decision of invalidity, it would seem not to be in a position to raise its constitutional attack upon the Federal Power Act. Cf. *Berea College* v. *Kentucky,* 211 U. S. 45, 54; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479–480.

Each condition, however, is a reasonable and valid requirement for the United States to exact as a condition to its permission to build a dam which otherwise would be forbidden.

1. *The Scope of the Constitutional Issue.*—Since the United States has power to forbid construction or operation of respondent's project, it has corresponding power to permit the project to be constructed and operated if prescribed conditions are observed. The proposition is incontestable as a matter of logic and is amply supported by the authorities (Govt. Br. 130–131). Respondent does not seem to dispute that, if the Government can forbid the structure, it may permit it upon *some* conditions. Its attack is based instead on the ground that only those conditions can be required which relate directly to navigation (Rsp. Br. 121). Since we do not urge that all of the conditions prescribed by the Act relate to navigation alone, the constitutional issue reduces itself to the narrow inquiry whether the power to forbid the construction and operation of the project, because of its relation to navigation and navigable capacity, includes the power to permit its construction and

operation upon prescribed conditions, some of which do not relate to navigation alone.

We can still further delimit the scope of the issue. We do not urge that the United States can attach any conditions whatever to its license for construction and operation; it may be assumed that they must be designed to further or to protect a legitimate federal interest. Indeed, it may be assumed that the conditions must not only fulfill a legitimate federal purpose but that this purpose must also be one which bears some relation to the source of the licensing power.

In short, then, this case merely requires the Court to decide whether the power of the Government to license the project permits it to attach conditions reasonably designed to advance and to protect the interests of the United States in regard not only to navigation and flood control but also in respect of power development, conservation of water resources, and the other aspects of an integrated river development which can be made to serve the public welfare.

There is, therefore, no need to reply to the attacks of respondent (Rsp. Br. 117, 127) and *amicus curiae* (N. C. Br. 14, 21–24) so far as they are directed at the exaction of conditions having no relation to a proper federal interest in the development and integration of water resources.

2. *The Conditions Further a Legitimate Federal Interest in Water Resources.*—The respondent contends that Congress may regulate the rights of a

riparian owner *only* to the extent required for navigation. From this premise respondent argues that Congress may not say that the project is not an impairment to navigation by issuing a license and at the same time forbid the project save on conditions allegedly unrelated to navigation (Br. 134–136).

The simplest answer is that the constitutional authority of Congress is not limited to the power to prohibit an unlicensed impairment to navigation. The Congress may also authorize or itself construct a project for navigation and flood control which, if undertaken by a private party without congressional consent, could be forbidden as an obstruction. *Arizona* v. *California,* 283 U. S. 423, 452.

(a) *The Government Could Itself Undertake the Project and Accomplish All of the Conditions of the License.*—The *amicus curiae* brief seems to confine its attack on the interest of the Federal government in the license conditions to the limited issue whether the Government could itself construct the project (N. C. Br. 20). But, as we have shown, the United States could itself erect a dam and power plant above Radford if the stream were navigable, or if the dam aided downstream navigation, or if it were an integral factor in the flood-control program (Govt. Br. 119–120).

Apart from questions of compensation, treated below, respondent objects to this conclusion only because its project is simply a power project (Rsp. Br. 110, 117, 130, 131). But, because respondent

views its own project only as a power project, it by no means follows that the same project would not be a navigation and a flood-control project if it were undertaken by the United States. The power purposes, which naturally enough provide the project's sole interest to respondent, would in the hands of the federal government be merely subordinate means to larger nonpecuniary ends. See *Arizona* v. *California,* 283 U. S. 423; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *New Jersey* v. *Sargent,* 269 U. S. 328, 335–336; statement of Senator Root, 49 Cong. Rec. 3058.

If the United States had itself undertaken the construction and operation of the project for navigation and flood control, it plainly could have accomplished each of the conditions to the license to which respondent objects. It would be unthinkable that the Government could not ensure that its project be best adapted to a comprehensive plan for improving waterways, developing power resources, and other public uses (Sec. 10 (a)), *Arizona* v. *California,* 283 U. S. 423; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288. And since Congress could construct the project, it may obviously reserve the right to take it over (Sec. 14) and prescribe related conditions as to the maintenance of the project and the conditions of recapture (Secs. 10 (c), 10 (d)).

It follows that each of the conditions prescribed by the Federal Power Act for licenses relates to a legitimate federal interest, arising out of the use

of streams which are navigable or which affect navigability, and that the United States is not trespassing upon forbidden ground when it uses its power to forbid construction and operation of the project to accomplish these ends.

(b) *The Congress May Either Prohibit the Project or License Its Construction on Conditions Appropriate to a Government Project.*—It is obvious that a project located on a navigable river may constitute a physical obstruction to navigation even though it also creates a navigable channel (cf. *Arizona* v. *California, supra*), and it is equally clear that a dam on a nonnavigable stretch of the river may both impair navigable capacity in one stretch of the river and substantially improve navigation on other stretches. Likewise, a water-development project may impair channel depths but provide substantial flood-control storage. Water-storage reservoirs may aid or impair flood control according to their method of operation. Whether the advantages of a project offset the disadvantages is obviously a question for Congress rather than the private operator to determine. The Government may therefore construct a project for navigation and flood control which private individuals are forbidden to undertake without congressional consent. *Arizona* v. *California, supra,* at 452.

Since the Government may of course do through an agent or licensee what it may do directly, it may both forbid private development and license con-

struction by its own agent for navigation and flood control. It was upon this settled proposition of constitutional law that the Federal Power Act was designed (Govt. Br. 114–119).[30]

The respondent's contention that Congress cannot compel it to obtain a license as a condition of exercising a property right which it already enjoys (Br. 117–118) is probably directed only to the question of compensation, but so far as it bears on the scope of federal powers it is plainly beside the mark. Respondent assumes that Congress cannot both prohibit the Radford project and permit its construction under license. Since, as we have shown, the Congress may either prohibit the project or authorize it on the conditions prescribed by the Federal Power Act, the respondent has no legal right to undertake a power development without a license. The sole inducement to accept the offer, therefore, is that respondent may thereby obtain power benefits to which it is not otherwise entitled.

[30] Several courts have recognized that the licensee of the Federal Power Commission is for many purposes simply the agent of the federal government. *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606 (D. Ala.); *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. (2d) 84 (C. C. A. 4th). For many purposes, of course, the licensee is not to be regarded as a technical agent of the United States. *Susquehanna Co.* v. *Tax Commission*, 283 U. S. 291, 293–294; *Broad River Power Co.* v. *Query*, 288 U. S. 178, 180–181. But, whatever the preferable nomenclature, the licensee advances appropriate federal purposes when it constructs the project and conforms to the prescribed conditions.

The offer of such economic benefits is not the exercise of compulsion, and any acceptance of the offer is wholly voluntary. *Cf. Steward Machine Co.* v. *Davis,* 301 U. S. 548, at 589–590; *Massachusetts* v. *Mellon,* 262 U. S. 447, 480.

3. *The Charge of Confiscation.*—Respondent objects, finally, that the conditions of the license are unconstitutional because they take its property without just compensation (Rsp. Br. 123–128). It complains, in this regard, that the Act takes its property (a) by restricting its use and (b) by the recapture provisions of Section 14.

(a) *Power Rights.*—The objection to the restrictions upon respondent's use of its property relates only to its property interest in its power rights. All uses of its lands are open to it without restriction, except only their use to construct a dam and power plant in the stream which will affect navigation or navigable capacity. This use of these riparian lands has a compensable value only with regard to whatever power rights attach to riparian lands along a stream with a utilizable fall.

If the United States had itself undertaken to construct the project, it would not have been required to compensate respondent for its power rights. *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, settles that an upland owner can have no compensable property in the flow of a stream

which can be utilized only in a manner which the Government can forbid. The case is directly applicable and conclusive if respondent's project is located in navigable waters of the United States. Its reasoning is equally applicable if the project will impair navigable capacity or flood control. The decision proceeded upon the ground that the riparian lands could not be devoted to power purposes without the construction of a project which the Government could forbid. 229 U. S. at 70–71. On like principle, no compensation for power value is required if the riparian lands on a nonnavigable stream cannot be devoted to power purposes without regulating the stream in a manner which the Government may forbid in order to protect downstream navigation and navigable capacity. In that case, as fully as though it were located in navigable waters, the project can be built or operated only with the permission of the Government. Against the Government, then, there can be no property rights in that water flow which can be utilized only with its permission.

Since there would be no duty to compensate respondent for its power rights if the lands or project were condemned by the United States, there can be no taking without just compensation if the Government chooses to license private capital to accomplish the same ends in its place. The property right, in either case, is nonexistent against the Gov-

ernment. It cannot be doubted that, if the Commission had licensed a power company other than respondent to construct a project at the Radford site, the licensee could condemn respondent's riparian lands under Section 21 of the Federal Power Act without making compensation for power value. *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606 (D. Ala.). The respondent cannot complain if the Government offers to permit respondent itself to enjoy the power benefits under the license restrictions. Viewed in another light, the Federal Power Act is simply the offer of a bargain to the licensee: the United States defers its right to take the power rights for its own use without compensation, and the licensee in turn accepts the terms of the license as the price of retaining its right to develop the power resources for its own profit. The Constitution does not require that the Government go through the formality of instituting condemnation proceedings before it undertakes to offer a mutually advantageous bargain to private capital.

(b) *The Recapture Clause.*—Respondent objects that the power of the United States to take over the project, after the expiration of the 50-year license, at its net investment cost, or at its fair value if that be lower, is an unconstitutional confiscation of its property without just compensation (Resp. Br. 125–123, 133–138). We have shown, on the

other hand, that Section 14 is a reasonable condition for the United States to attach to its permission to construct and operate the project (Govt. Br. 139–141), and that it would be a valid enactment even if there were no power to prohibit the project (Govt. Br. 141–144).

We see no reason to supplement the discussion in our main brief. We may, however, point out that respondent's attempt (Rsp. Br. 136) to distinguish *Fox River Co.* v. *Railroad Commission,* 274 U. S. 651, serves only to show that case to be conclusive of the issue here. The Wisconsin statute, as does the Federal Power Act, granted a license for the construction of a hydroelectric plant subject to the condition, *inter alia,* that the state could recapture the plant at the end of the license period upon the payment of an amount urged to be less than the "fair value" which would be required by the Constitution if the state were to condemn the project. Respondent seeks to distinguish the case on the grounds (1) that the states have power to engage in the electric power business, and (2) that the states, so long as they do not confiscate vested property rights, may establish such riparian property laws as they choose. Neither ground is tenable. (1) The United States, as we have shown above, has full authority to construct and operate a project such as respondent's. (2) The reservation that the states may not confiscate vested property rights

ignores the very question in issue here, which is the charge that the Federal Power Act confiscates respondent's property through the operation of the recapture clause. And, it may be noted, whatever property rights the states may have in the power rights and the flowage of water do not reach to the power plant and equipment.

Respondent's attempt to distinguish the municipal franchise cases is equally unpersuasive (cf. Govt. Br. 140, Rsp. Br. 136). Just as the municipality may condition use of its streets, which it has power to forbid, on rates or recapture which otherwise would be confiscatory, so the United States may condition its consent to the use of streams by structures which would affect navigation and navigable capacity. None is compelled to accept the use of either the streets or the streams; and whether the source of the power to forbid is proprietary or regulatory is wholly immaterial.[31]

[31] In our main brief we advance as an alternative (Govt. Br. 140) argument that respondent cannot now challenge the recapture provisions, which would operate, if at all, only after a period of 50 years (Govt. Br. 137–139). In *Montana Power Co.* v. *Federal Power Commission*, 112 F. (2d) 371, 374 (C. C. A. 9th), decided since our main brief was printed, the court so ruled. It said: "The United States has not taken, has not threatened to take, and cannot for about fifty years, take the line in question. Under these circumstances, we think petitioner has no standing to raise the question. *New Jersey* v. *Sargent*, 269 U. S. 328, 339; *United States* v. *West Virginia*, 295 U. S. 463, 474. * * *"

CONCLUSION

For these reasons, in addition to those set out in our main brief, it is respectfully submitted that the decision of the court below should be reversed.

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